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September 7, 2005

Via Electronic Filing

Marlene H. Dortch Secretary Federal Communications Commission 445 12<sup>th</sup> Street, S.W. Washington, D.C. 20554

Re: In the Matter of ccAdvertising Petition for Expedited Declaratory Ruling,

DA 05-1347, DA 04-3187, CG Docket No. 02-278

Dear Ms. Dortch:

FreeEats.com, Inc., d/b/a ccAdvertising ("ccAdvertising" or "FreeEats"), hereby responds to the letter, dated August 26, 2005, from James Patrick Thomas, Assistant Attorney General, Consumer Protection & Antitrust Division, Office of Attorney General of the State of North Dakota ("North Dakota"), with respect to ccAdvertising's above-referenced Petition for Expedited Declaratory Ruling (the "Petition").

North Dakota's August 26 letter purports "to address a material misrepresentation of fact" in ccAdvertising's August 18, 2005 Reply Comments, and complains that ccAdvertising did not acknowledge three filings in this proceeding. Specifically, North Dakota cites two letters, dated November 17, 2004 and July 29, 2005, signed by the Attorneys General of various states, the District of Columbia, Puerto Rico, Guam, and the Virgin Islands, and by the Executive Director of the Hawaii Office of Consumer Protection (the "AG Letters"). (North Dakota also cites a third letter, dated July 29, 2005 and signed by ten U.S. Senators; however, that letter is not among the docketed entries for July 29, 2005, and ccAdvertising has not seen a copy of it.) The AG Letters do not refer to or discuss the Petition in any substantive way, nor do they address directly any issue raised in the Petition. They simply "express [the signatories'] agreement with the rationale and arguments" in North Dakota's November 8, 2004 Comment and July 29, 2005 Supplemental Comment. By stating in its Reply Comments that North Dakota was the only party that opposed or directly opposed the Petition, ccAdvertising was referring to the fact that



North Dakota is the only party that has responded directly to the specific facts and legal issues raised in the Petition, as opposed to issues of more general applicability that are under consideration in this proceeding, or mere expressions of support for others' positions.

In any event, ccAdvertising does find the AG Letters notable, because the Attorney General of Minnesota is a signatory to both. The Minnesota Attorney General thus agrees with North Dakota's assertions regarding *Van Bergen v. Minnesota*, 59 F.3d 1541 (8<sup>th</sup> Cir. 1995). That agreement is surprising in light of information filed recently in this docket by the Direct Marketing Association ("DMA") – information that unequivocally refutes North Dakota's arguments about the applicability of *Van Bergen* and about which the Minnesota Attorney General may be presumed to have knowledge.

Both in its opposition to the Petition and its state law action against FreeEats, North Dakota has placed substantial emphasis on *Van Bergen*. In its initial comments opposing the Petition, North Dakota stated:

The Eighth Circuit Court of Appeals [in *Van Bergen*] has directly addressed, and rejected, conflict preemption with respect to the TCPA and a law virtually identical with [the North Dakota law at issue here].... And, of course, the North Dakota statute is virtually identical to the Minnesota statute; the same result should obtain. <sup>1</sup>

In its state court enforcement action against FreeEats, North Dakota stated:

FreeEats tries to distinguish [Van Bergen] on the grounds that it involved only intrastate calls.... The opinion does not indicate whether the calls originated in Minnesota or were made from another State nor does it present an analysis of the interstate/intrastate issue.<sup>2</sup>

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Comments of North Dakota, November 8, 2004, at 32.

Supplemental Comment, Exhibit 1 (North Dakota's Brief in Opposition to Motion to Dismiss Complaint and in Support of Cross-Motion for Summary Judgment on Liability, October 13, 2004, Case No. 04-C-1694 (N.Dak. So. Cent. Jud. Dist.)), at 27 (citation omitted).



North Dakota again invoked *Van Bergen* in its recent Supplemental Comment: "FreeEats argues Van Bergen related only to intrastate calls; but, *the record does not establish this to be the case.*"<sup>3</sup>

In the AG Letters, the Minnesota Attorney General agreed unconditionally with these assertions. However, the Minnesota Attorney General cannot have been unfamiliar with the federal district court opinion that was the subject of the appeal in *Van Bergen*, a copy of which is now in the record of this proceeding; <sup>4</sup> that decision makes clear that **only intrastate** calls were at issue in *Van Bergen*.

Van Bergen, a candidate for governor, sought to enjoin enforcement of a state law prohibiting certain uses of automatic dialing-announcing devices ("ADADs"), which he intended to utilize to reach potential voters. He argued that "[b]ecause [the state statute] attempts to regulate interstate calls ... [it] falls outside the scope of the saving language of 47 U.S.C. 227(e)(1) and is preempted."<sup>5</sup>

The district court responded:

Van Bergen has represented that he intends to use ADADs to contact Minnesota residents.... Van Bergen is a Minnesota resident; there is no evidence presently before the Court that he intends to connect his ADAD machines to telephone lines anywhere other than in Minnesota. Thus, regulation of his use of ADADs would involve intrastate communications.

Consequently, the district court held that Van Bergen lacked standing to challenge the constitutionality of the Minnesota statute because there was no connection between himself, as

Id.

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Supplemental Comment, Exhibit 2 (North Dakota's Brief in Opposition to Defendant's Cross-Motion for Summary Judgment, December 13, 2004, Case No. 04-C-1694 (N.Dak. So. Cent. Jud. Dist.)), at 20, n.2 (emphasis added).

The federal district court's Memorandum Opinion and Order is set forth in full as an Addendum to the Appellant's Brief and Addendum filed with the 8<sup>th</sup> Circuit, which is Exhibit A to the Reply Comments of the Direct Marketing Association, filed August 18, 2005 in CG Docket No. 02-278 et al. A copy of the decision, Van Bergen v. Minnesota, Civil No. 3-94-731, Memorandum Opinion and Order, July 18, 1994, also is included as Attachment 1 hereto.

<sup>&</sup>lt;sup>5</sup> *Id.* at 11.



an intrastate caller, and the rights of third party interstate callers. It was in this context that the district court concluded that:

> Van Bergen cannot be heard to claim that the ... TCPA ... preempts Minnesota's ADAD statute since he cannot show that any injury to himself is fairly traceable to the fact that the Minnesota statute may regulate the interstate use of ADADs.8

Van Bergen's Brief on appeal to the Eighth Circuit confirmed that "[t]he Trial Court decided that the [Minnesota] Statutes were not preempted in this case because Plaintiff did not allege that he would be making calls over interstate phone lines." On appeal, Van Bergen again argued that Minnesota's law should be preempted because of the possibility that it could be enforced against interstate calls.10

Considered in context, it becomes clear that the Eighth Circuit's conclusions with respect to preemption of state law addressed only state law having an intrastate effect, and that the Court did not address preemption with respect to state law having an interstate effect. The Court held that Section 227(e)(1) of the TCPA "does not state that all less restrictive requirements are preempted; it merely states that more restrictive intrastate requirements are not preempted. The TCPA, therefore, does not expressly preempt the Minnesota statute" - which contained a more restrictive requirements on intrastate use of ADADs.

In sum, Van Bergen involved an attempt to enjoin enforcement of a state law prohibiting the use of ADADs as applied only to intrastate calls. The party seeking to make the intrastate calls invoked the possibility of the law's applicability to interstate calls to support its constitutional challenge to the law. However, because no interstate calls were proposed to be made and no state law was enforced with respect to interstate calls, there was no occasion for the court even to address the issue before the court in North Dakota, where the state seeks to apply its law to prohibit the use of ADADs for exclusively interstate calls.

9 Van Bergen Brief and Addendum (Exhibit 1 to the DMA Reply Comments), at 48.

Id. at 12-13.

<sup>8</sup> Id. at 13.

<sup>10</sup> See id. at 49.

<sup>11</sup> Van Bergen, 59 F.3d at 1547-48.



ccAdvertising fully concurs with North Dakota's statement that "[t]he legal analysis of the preemption issue is not a popularity contest." Consequently, the AG Letters, notwithstanding the number of signatories, should carry no weight regarding the specific issues raised in ccAdvertising's Petition for Declaratory Ruling. Those issues arise under a specific provision of North Dakota law as applied to interstate calls utilizing ADADs for political polling purposes, and are not addressed in the AG Letters.

Respectfully submitted,

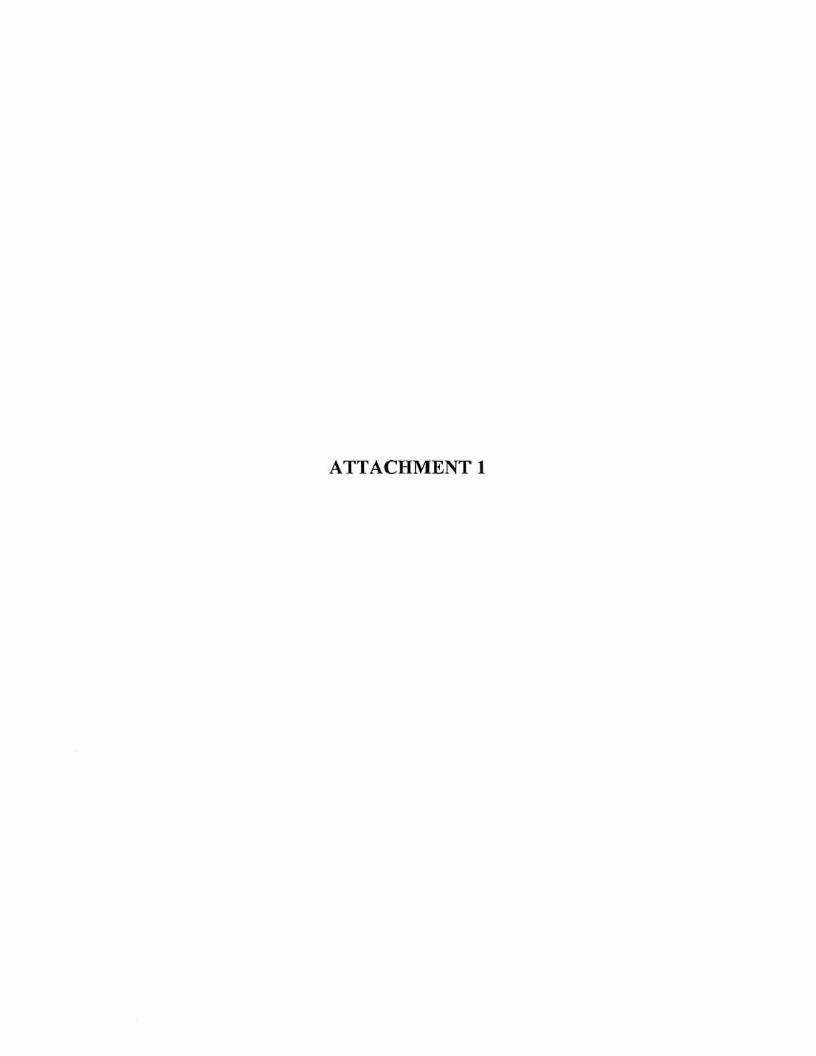
E. Ashton Johnston

Attachment

cc: James Patrick Thomas,
Assistant Attorney General
State of North Dakota

12

North Dakota August 26, 2005 Letter at 3.



## UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA THIRD DIVISION

Richard T. Van Bergen,

Plaintiff,

vs.

Civil No. 3-94-731 MEMORANDUM OPINION AND ORDER

The State of Minnesota, Hubert H. Humphrey III, in his capacity as Attorney General of the State of Minnesota,

Defendants.

Daryl J. Bergmann, Business Legal Services, Bloomington, Minnesota, for plaintiff.

James P. Jacobson and Peter Ackerberg, Minnesota Attorney General's Office, Saint Paul, Minnesota, for defendants.

#### Introduction

The plaintiff, Richard T. Van Bergen, was heard by this

Court on the merits of his request for declaratory and permanent
injunctive relief. On June 30, 1994, the Court heard and denied
plaintiff's Application for a Temporary Restraining Order;
pursuant to Rule 65(a)(2) of the Federal Rules of Civil

Procedure, the Court scheduled the matter for trial. Testimony
was taken, affidavits and memoranda were filed, and the arguments
of counsel were heard. Van Bergen has raised a number of federal
and state constitutional challenges to the Minnesota Automatic
Dialing-Announcing Device ("ADAD") statute, Minn. Stat. §§
325E.26-.31 (1992) ("the ADAD statute"). Plaintiff contends that
the ADAD statute violates:

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devices ("ADADS"). Minn. Stat. §§ 325E.26-.31. The ADAD statute forbids a "caller" from using an ADAD to disseminate prerecorded or synthesized voice messages unless the caller has the consent of the recipient -- termed a "subscriber" -- to deliver the message. The ADAD statute contemplates that a caller can obtain permission either through a live operator or by virtue of the fact that the subscriber may have previously consented to or authorized receiving the message. Id. § 325E.27. The statute creates three categories of messages for which the subscriber's consent is not required: (1) messages from school districts to students, parents, or employees, (2) messages to subscribers with whom the caller has a current business or personal relationship, or (3) messages advising employees of work schedules. Id.

Any ADAD machine must be designed and operated so as to disconnect within ten seconds after termination of the telephone call by the subscriber. <u>Id.</u> § 325E.28. If the caller uses a live operator to obtain consent from the subscriber, the operator

<sup>&</sup>lt;sup>2</sup> An automatic dialing-announcing device is "a device that selects and dials telephone numbers and that, working alone or in conjunction with other equipment, disseminates a prerecorded or synthesized voice message to the telephone number called." Minn. Stat. § 325E.26.

<sup>3</sup> A "caller" is defined as "a person, corporation, firm, partnership, association, or legal or commercial entity who attempts to contact, or who contacts, a subscriber in this state by using a telephone or a telephone line. "Minn. Stat. § 325E.26, subd. 3.

A "subscriber" is defined by the statute as "a person who has subscribed to telephone service from a telephone company or the other persons living or residing with the subscribing person." Minn. Stat. § 325E.26, subd. 5.

must disclose certain information at the outset of the call.<sup>5</sup>

<u>Id.</u> § 325E.29. ADADs may not be used between the hours of 9:00

p.m.and 9:00 a.m. The ADAD statute also places time of day

limits on "commercial telephone solicitations."<sup>6</sup>

In 1992, the ADAD statute was challenged as violative of the First Amendment in Minnesota state court. In <u>State by Humphrey v. Casino Marketing Group</u>, the Minnesota Supreme Court analyzed the ADAD statute and determined that its provisions regulate the use of ADADs for "commercial telephone solicitation," as that term is defined in Minn. Stat. § 325E.26, subdivision 4.7 491 N.W.2d 882, 886 (Minn. 1992), <u>cert. denied</u> 113 S. Ct. 1648

Minn. Stat. § 325E.29

<sup>5</sup> The operator must disclose

<sup>(1)</sup> the name of the business, firm, organization, association, partnership, or entity for which the message is being made;

<sup>(2)</sup> the purpose of the message;

<sup>(3)</sup> the identity or kinds of goods or services the message is promoting; and

<sup>(4)</sup> if applicable, the fact that the message intends to solicit payment or commitment of funds.

The ADAD statute prohibits the making of "commercial telephone solicitations" between the hours of 9:00 p.m. and 9:00 a.m. Minn. Stat. § 325E.30. A "commercial telephone solicitation" is "any unsolicited call to a residential subscriber when the person initiating the call has not had a prior business or personal relationship with the subscriber, and when the purpose of the call is to solicit the purchase or the consideration of purchase of goods or services by the subscriber." Id. § 325E.26, subd. 4. The Statute exempts from the definition of commercial telephone subscription those calls initiated by various organizations such as non-profit organizations, charities, fraternal organizations, etc.

<sup>&</sup>lt;sup>7</sup> See supra note 6.

(1993). Having determined that the statute regulates only commercial speech, the court evaluated its constitutionality under the test set forth in <u>Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n</u>, 447 U.S. 557, 100 S. Ct. 2343 (1980) and <u>Board of Trustees of the State University of New York v. Fox</u>, 492 U.S. 469, 109 S. Ct. 3028 (1989).

The Minnesota Supreme Court held that the ADAD statute constitutionally regulated the time, place, and manner of commercial telephone solicitations using ADADs. Casino Marketing Group, 491 N.W.2d at 891-92. The court identified residential privacy as the substantial interest served by the ADAD statute and determined that the use of ADADs to deliver commercial messages "intolerably encumbers fundamental notions of residential privacy." Id. at 888. The court concluded that the ADAD statute struck an acceptable balance between the value of disseminating information efficiently and the privacy interest of a nonpublic forum. Id. at 890.

During the 1994 regular session, the Minnesota Legislature amended the ADAD statute to define a message as "any call, regardless of its content." 1994 Minn. Sess. Law Serv. 523 (West). The amendment thus defines a term which appears in section 325E.27, restricting the use of ADADs to deliver prerecorded or synthesized voice messages, and in section

<sup>&</sup>lt;sup>8</sup> The court rejected an argument that the consent requirement would guard against telemarketing fraud, reasoning that the requirement of using a live operator would not directly advance such a purpose.

325E.29, detailing what must be said when such a prerecorded or synthesized voice message is immediately preceded by a live operator. The amendment took effect on July 1, 1994.

## B. Van Bergen's Campaign for Governor

Richard Van Bergen declared his candidacy for the Minnesota governor's office in December of 1993. He officially registered on July 5, 1994, as a Democratic/Farmer-Labor candidate for the September primary election. (Aff. of Richard Van Bergen, ¶ 3.) See Minn. Stat. § 204B.09, subd. 1 (establishing the date for registration). Van Bergen asserts that he has focused his campaigning efforts on the use of ADADs to disseminate a prerecorded message which announces his candidacy for the governor's office and urges the listener to vote in the primary, (Van Bergen Aff. ¶ 4.) Van Bergen contends that he lacks the financial resources to purchase an automatic dialer (known as a "predictive dialer") which connects the subscriber to a live operator or to hire enough employees to staff a telecommunications campaign: thus, he alleges that he is entirely dependent on the use of automatic dialing and prerecorded message technology. (Id. ¶ 8.) Van Bergen contends that for every day he cannot use ADADs to deliver his message, he has lost the opportunity to contact over 4,200 subscribers per day. (Van Bergen Aff. ¶ 9.)

### Analysis

# I. Threshold Issues

### A. The Defendants' Immunity from Suit

The defendants contend that this Court lacks jurisdiction, under the Eleventh Amendment, over plaintiff's claims against the State. The defendants further contend that the state law claims against the Attorney General in his official capacity must be dismissed for the same reasons. The Court will address each argument in turn.

## 1. The State's Immunity from Suit

The Eleventh Amendment provides:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const., amend. XI. Regardless of the nature of the relief sought, "in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment" Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 100, 104 S. Ct. 900, 908 (1984); accord Edelman v. Jordan, 415 U.S. 651, 94 S. Ct. 1347 (1974); Hans v. Louisiana, 134 U.S. 1, 15-18, 10 S. Ct. 504 (1890). The test for determining whether a state has waived its Eleventh Amendment immunity to suit in federal court is "a stringent one." Atascadaro State Hosp. v. Scanlon, 473 U.S. 234, 241 (1985). Plaintiff adduced no evidence and made no argument that the State

has consented to suit in this action. Nor has plaintiff argued that Congress abrogated the state's immunity under the Eleventh Amendment by statute, such that it may be sued for an alleged violation of the federal constitution. The State of Minnesota has not consented to suit in this action and, therefore, this Court lacks jurisdiction over the claims against it under the Eleventh Amendment.

#### The Attorney General's Immunity from Suit

There is an exception to the Eleventh Amendment for suits challenging the constitutionality of a state official's action. Thus, a citizen of a state can sue a state official to enjoin the prospective unconstitutional actions of that official. Edelman, 415 U.S. at 666-67, 94 S. Ct. at 1357-58; Ex parte Young, 209 U.S. 123, 160, 28 S. Ct. 441, 454 (1908). The ADAD statute provides that "[a] person who is found to have violated [the ADAD statute] is subject to the penalties and remedies, including a private right of action to recover damages, as provided in section 8.31." Minn. Stat. § 325£.31. Section 8.31 defines various duties of the attorney general; subdivision 2 states that the attorney general shall investigate and assist in the punishment of illegal practices. Minn. Stat. § 8.31, subd. 2. Therefore, with respect to Van Bergen's claims that the ADAD statute violates the federal constitution, the Court notes that the Attorney General is charged with the enforcement of the ADAD statute, and plaintiff may seek an injunction of his future

enforcement actions.

Under Eleventh Amendment jurisprudence, a federal district court cannot exercise pendent jurisdiction to hear a state law claim against a state official. Pennhurst, 465 U.S. at 120-21, 104 S. Ct. at 918-19 (1984). Van Bergen contends that the bill which contained the amendment was passed in violation of the Minnesota constitutional requirement that "[n]o law shall embrace more than one subject, which shall be expressed in its title," such that the manner in which it was passed obscured its purpose and effect from the legislature and the public. Minn. Const. art. 4, sec. 17. Van Bergen also contends that the ADAD statute violates the Minnesota constitution's free speech guarantees. To the extent that Van Bergen alleges that Attorney General Humphrey has violated or will violate the Minnesota Constitution through his enforcement of the ADAD statute, the Court lacks jurisdiction to decide such a claim.

<sup>&</sup>lt;sup>9</sup> Thus, although plaintiff and his supporters monitored the legislature to learn of proposed restrictions on the use of ADADs, they contend that they did not become aware of the amendment until it was published in the session law service on June 7, 1994.

<sup>&</sup>quot;The single subject clause is intended to prevent 'fraudulent insertion' of matters wholly unrelated to the bill's primary subject, not to prevent comprehensive legislation." Metropolitan Sports Facilities Comm'n v. Hennepin County, 478 N.W.2d 487, 491 (Minn. 1991). The constitutional provision requires that "all matters in the bill be 'germane' to one general subject." Id. (citing Blanch v. Suburban Hennepin Regional Park Dist., 449 N.W.2d 150, 154-55 (Minn. 1989)). The challenged amendment to the ADAD statute was part of a bill entitled "A bill for an act relating to telecommunications."

## B. Standing

Van Bergen contends that the Minnesota statute is preempted by the TCPA is based upon 47 U.S.C. § 227(e)(1) of the TCPA, which reads as follows:

- (e) Effect on State Law.
  - (1) State law not preempted

Except for [technical and procedural standards set forth at 47 U.S.C. § 227(d)] and [provisions concerning a state's use of a national database of subscribers who do not wish to receive telephone solicitations], nothing in this section [i.e., section 227] or in the regulations prescribed under this section shall preempt any state law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

- (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
- (B) the use of automatic telephone dialing systems;
- (C) the use of artificial or prerecorded voice messages: or
- (D) the making of telephone solicitations. 47 U.S.C. § 227(e)(1).

Van Bergen argues that the ADAD statute regulates and imposes more restrictive requirements on both the intrastate and interstate use of ADADs and artificial/prerecorded voice messages. Plaintiff bases this argument on the state statute's definition of "caller." A "caller" subject to the restrictions of the state statute is "a person, corporation, firm, partnership, association, or legal or commercial entity who attempts to contact, or who contacts, a subscriber in this state

by using a telephone or a telephone line." Minn. Stat. § 325E.26, subd. 3. Van Bergen argues that the ADAD statute specifies only the location of the recipient of the call; the location of the caller is not similarly restricted to those in the state. Thus, the Minnesota statute regulates the use of ADADs for calls which originate both within the state and outside the state. Because it attempts to regulate interstate calls, Van Bergen concludes, the state statute falls outside the scope of the saving language of 47 U.S.C. § 227(e)(1) and is preempted.

Van Bergen has represented that he intends to use ADADs to contact Minnesota residents (1) to encourage them to vote in the upcoming primary and general elections and (2) to introduce himself to the public as a candidate for governor. Van Bergen is a Minnesota resident; there is no evidence presently before the Court that he intends to connect his ADAD machines to telephone lines anywhere other than in Minnesota. Thus, regulation of his use of ADADs would involve intrastate communications. A threshold issue before the Court, therefore, is whether a plaintiff for whom the law as applied to him is not violative of

The parties do not dispute that the state statute imposes more restrictive regulations or requirements on the use of ADADs and artificial/prerecorded voice messages. It is clear that the state statute is more restrictive in that it affects a larger class of telephone messages — the federal statute only applies to commercial solicitations, whereas the state statute — as amended in 1994 — applies to all messages, commercial or noncommercial. Nor do either of the parties contend that the Minnesota statute is a prohibition on the use of ADADs; the use of automatic dialing machines is conditioned upon the caller acquiring the prior consent of the recipient before a prerecorded message is played. Thus, the only issue under the federal statute's preemption clause is whether the Minnesota statute is an intrastate regulation.

the Supremacy Clause has standing to challenge the statute as facially violating the Supremacy Clause.

As a general rule, even though the very same allegedly illegal act that affects the litigant also affects a third party, a litigant must seek to vindicate "'his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'" Valley Forge Christian Coll. v. Americans United for Separation of Church and State, 454 U.S. 464, 474, 102 S. Ct. 752, 759 (1982) (quoting Warth v. Seldin, 422 U.S. 490, 499, 95 S. Ct. 2197, 2205 (1975)). Thus, "one to whom application of a statute is constitutional will not be heard to attack the statute on the grounds that impliedly it might also be taken as applying to other persons or other situations on which its application might be unconstitutional." United States v. Raines, 362 U.S. 17, 21, 80 S. Ct. 519, 522 (1960). One exception to this rule is the doctrine of thirdparty standing: in certain limited circumstances, a party can raise the rights of third parties in light of (a) the relative inability of the third party to assert his own rights, Singleton v. Wulff, 428 U.S. 106, 96 S. Ct. 2868 (1976) or (b) the dependency of the litigant's interests on establishing the rights of a third person, Craig v. Boren, 429 U.S. 190, 97 S. Ct. 451 (1976). The plaintiff has alleged no connection between himself and the rights of third party interstate users of ADAD technology such that he may challenge the constitutionality of the ADAD statute on the grounds that it applies to interstate

communications. Van Bergen therefore lacks the ability to challenge the validity of the Minnesota statute under the Supremacy Clause on behalf of some unknown third party who may wish to use ADADs for interstate communications.

The standing doctrine set forth in <u>Raines</u> does not apply to challenges made under the First Amendment; courts allow a plaintiff to challenge a statute on its face for overbreadth:

[A]n individual whose own speech or conduct may be prohibited is permitted to challenge a statute on its face "because it also threatens others not before the court -- those who desire to engage in legally protected expression but how may refrain from doing so rather than risk prosecution or undertake to have the law declared partially invalid."

Board of Airport Commissioners of Los Angeles v. Jews for Jesus, 482 U.S. 569, 574, 107 S. Ct. 2568, 2572 (1987). The "overbreadth" doctrine is limited to First Amendment jurisprudence and does not apply to challenges brought under the Supremacy Clause or other constitutional provisions. See generally 4 Ronald D. Rotunda & John E. Nowack, Treatise on Constitutional Law: Substance and Procedure, § 20.8 at 26-27 (2d ed. 1992). Therefore, Van Bergen cannot be heard to claim that the federal TCPA statute preempts Minnesota's ADAD statute since he cannot show that any injury to himself is fairly traceable to the fact that the Minnesota statute may regulate the interstate use of ADADs.

II. Constitutionality of the Minnesota ADAD Statute
Van Bergen contends that the ADAD statute, as amended,

violates the United States Constitution for two reasons. First, plaintiff argues that the amended statute violates his First and Fourteenth Amendment right to free speech. Second, Van Bergen contends that the amended statute exempts large groups of organizations in a discriminatory manner, in violation of the Equal Protection Clause of the Fourteenth Amendment. The Court will address each argument in turn.

- A. Violation of the First and Fourteenth Amendments.
  - Is the statute content-based or content-neutral?

The degree of scrutiny to which a restriction of First

Amendment speech rights will be subjected depends, in the first
instance, upon the nature of the statute at issue. Content-based
regulations of speech are subjected to a higher degree of
scrutiny than content neutral regulations. The former type of
regulation is subjected to strict scrutiny; it must be narrowly
drawn to achieve a compelling state interest by the leastrestrictive means possible. Ward v. Rock Against Racism, 491

van Bergen alleges that the Statute as amended is unconstitutionally overbroad and vague. The Court concludes, <u>see infra</u>, that the statute operates as a content-neutral regulation of <u>conduct</u>, the use of a specified form of technology. Accordingly, the statute's overbreadth must be "substantial" as well as real. <u>Broadrick v. Oklahoma</u>, 413 U.S. 601, 615, 93 S. Ct. 2908, 2917-18 (1973). The statute does not prohibit the use of the telephone to communicate to the public, nor does it prohibit the use of ADAD machines in toto. Plaintiff has failed to demonstrate that the statute is substantially overbroad. With respect to plaintiff's vagueness argument, the Court concludes that the statute is specific in identifying the conduct that is restricted: a caller may not use ADADs to deliver <u>any</u> prerecorded or synthesized voice messages without first obtaining the recipient's consent.

U.S. 781, 798 n.6, 109 S. Ct. 2746, 2758 n.6 (1989). The latter type of regulation is subjected to a balancing analysis and must be narrowly tailored to serve a significant state interest while leaving open ample alternative means of communications. reviewing the constitutionality of the ADAD statute prior to its amendment in 1994, the Minnesota Supreme Court concluded that the statute was a time, place and manner restriction on commercial Casino Marketing, 491 N.W.2d at 891-92. The plain language of the ADAD statute as amended indicates that its restrictions now apply to the use of ADADs to deliver any prerecorded or synthesized voice message, regardless of the The message therefore no longer needs to relate to the content. "purchase or consideration of purchase of goods or services by the subscriber." Minn. Stat. § 325E.26, subd. 4. Accordingly, the Court concludes that the ADAD statute is now contentneutral. 13

#### Constitutionality.

"[I]n a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech,

plaintiff has contended that the ADAD statute operates as a prior restraint on free speech. A "prior restraint" is "any governmental order that restricts or prohibits speech prior to its publication." 4 Ronald D. Rotunda & John E. Nowack, <u>Treatise on Constitutional Law: Substance and Procedure</u>, § 20.16 at 80 (2d ed. 1992). In this case, the plaintiff's ability to utter speech has not been restricted; rather, the use of one form of technology for disseminating that speech has been restricted. Therefore, the statute does not act as a prior restraint. <u>See Casino Marketing</u>, 491 N.W.2d at 886-87.

provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.'" ward, 491 U.S. at 791, 109 S. Ct. at 2753 (1989). The defendants contend that, whereas the level of scrutiny set forth in ward is appropriate for regulations that restrict access to a public forum, the statute at issue here regulates a speaker's access to a nonpublic forum; hence, a content-neutral time, place, or manner regulation need only be "reasonable."

The Supreme Court has identified three fora for purposes of time, place and manner regulations: public fora, limited public fora and nonpublic fora. "Traditional public fora are those places which 'by long tradition or by government fiat have been devoted to assembly and debate.'" Cornelius, 105 S. Ct. at 3449 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S. Ct. 948, 954 (1983). 14 The government may create a public forum by designating a place or channel of communication for use by the public at large. Cornelius, 105 S. Ct. at 3449; Perry Educ. Ass'n, 460 U.S. at 45-46. Van Bergen contends that the telephone lines constitute a designated public forum because government regulation has made that private property available for public use. The defendants apparently

The <u>Perry</u> Court described this end of the public forum spectrum as including "streets and parks which 'have immemorially been held in trust for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'"

agree, stating that Van Bergen "seeks access to the privatelyowned telephone system that is dedicated to public use by federal
and state regulations." Defs.' Response at 2. Defendants
nevertheless contend that the telephone is a "nonpublic forum."

The Court concludes that the telephone lines are a designated public forum. The Minnesota legislature has vested regulatory authority over telephone companies in the department of public services and the public utilities commission. Minn. Stat. § 237.02. The telephone lines are private property which, through governmental regulation, have become available for public use. Therefore, a time, place and manner restriction must be "narrowly tailored to meet a substantial government interest and leave open ample alternative means of communication." Ward, 491 U.S. at 791, 109 S. Ct. at 2753.

Van Bergen contends that the statute cannot be "justified without reference to the content of the regulated speech" in that the Attorney General allegedly has an ulterior motive in enforcing the ADAD statute -- a personal desire to stifle the speech of plaintiff and other supporters of Lyndon La Rouche. As the <u>Ward</u> Court recognized, "A regulation that serves purposes unrelated to the content of the expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." 491 U.S. at 791, 109 S. Ct. at 2754. The record does not support a conclusion that the alleged motives of the Attorney General are attributable to the Minnesota

Legislature. 15 The purpose a statute will serve is distinguishable from the motive that prompted the legislature to pass it. See United States v. O'Brien, 391 U.S. 379, 383, 88 S. Ct. 1673, 1682 (1968). Furthermore, Van Bergen has presented no evidence that the amended statute has been selectively enforced on the basis of the speaker's message. Thus, there is insufficient evidence to find that the ADAD statute was passed in order to suppress the views of particular speakers.

The defendants have offered two rationales for the ADAD statute: (1) the protection of public safety and privacy, and (2) the prevention of the disruption of businesses operating within the state. The attorney general's office received numerous complaints from persons in the state -- primarily businesses, but also state agencies and individuals -- concerning recorded political messages which would occupy those persons' telephone lines. These calls created a perception that a problem existed with ADAD machines that were delivering noncommercial messages; the attorney general's office informed these complainants that the only body to address their concerns was the legislature. Aff. of Amy Finken, ¶¶ 3, 5.)

With respect to the state's interest in protecting privacy, the Court takes note of the state supreme court's analysis of subscribers' residential privacy interests in the <u>Casino</u>

<u>Marketing</u> decision. <u>See Casino Marketing</u>, 491 N.W.2d at 888-90.

<sup>15</sup> For this reason, the Court earlier quashed the plaintiff's trial subpoena for the Attorney General. See Order, July 12, 1994.

The United States Supreme Court has long held that the state has a substantial interest in securing residential privacy. See

Frisby v. Schultz, 487 U.S. 474, 108 S. Ct. 2495 (1988); Rowan v.

United States Post Office, 396 U.S. 1035, 90 S. Ct. 679 (1970);

Breard v. City of Alexandria, 341 U.S. 622, 71 S. Ct. 920 (1951).

Van Bergen argues that the restrictions in the ADAD statute are not reasonable in light of present telecommunications technology, specifically such devices as "caller ID" devices, voice messaging and answering machines. These technologies would be used by the recipients of the prerecorded message, however, to avoid taking the unsolicited call. To the extent a home is a person's castle, the Constitution does not require one to dig a moat around it to secure one's privacy.

With respect to the state's concern for public safety, the defendants have offered affidavits indicating that people have experienced difficulty getting an ADAD-placed prerecorded message to disengage the telephone line once the recipient of the call has hung up. (Aff. of Amy Finken. ¶ 4; .) One affiant attempted to call for assistance when her son began to have seizures, only to find that an ADAD-placed prerecorded message which she received at her unlisted telephone number would not disengage the line. (Aff. of Deb Lokke.) Hospitals have also received prerecorded messages placed by ADADs. (Aff. of Dennis Berkland.) The defendants argue that this delay poses a threat to public safety in that subscribers can be prevented from dialing emergency assistance numbers. Plaintiff responds that the

defendant's interest in public safety is not adequately served by this regulation of the use of ADAD technology; for example, the message complained of by a number of defendants' affiants was transmitted by a machine that is programmed to disconnect ten seconds after the recipient of the call has hung up. (Aff. of Philip Valenti). A time, place and manner regulation need not eliminate all of the problems addressed by the statute; it is sufficient if the government's interest "would be achieved less effectively absent the regulation." Ward, 491 U.S. at 799, 109 S. Ct. at 2758. The use of a live operator who could, if a subscriber did not consent to listen to the prerecorded message, disengage that line immediately and move on to the next call, would help eliminate the possibility of the unwanted delay which results when an ADAD fails to disengage immediately.

with respect to the impact of ADAD technology on businesses, the defendants' affidavits support the defendants' concern that ADAD technology allows prerecorded messages indiscriminately to "roll through" a business, occupying phone lines sequentially or simultaneously. (Aff. of Sharon Holt; Aff. of Patricia Humbert.) An additional problem indicated by the affidavits involves repeated calls to the same numbers; when an ADAD is unable to deliver a message, it stores the telephone number and attempts to dial it at a later time. Thus, some subscribers have complained of receiving numerous calls over the course of a one- or two-week period. (Aff. of Sharon Holt, ¶ 6; Aff. of Gerald Timian, ¶ 3; Aff. of Patricia Humbert, ¶ ¶ 4, 5.)

Plaintiff contends that ADAD technology has improved, thus the restrictions imposed by the statute are unreasonable. Plaintiff has offered no evidence, however, that such technology is readily available. Indeed, less than two years ago, the state supreme court noted that, whereas better technology was available, many people continued to use less expensive ADADs which, for example, did not disengage until the entire message had been played. Casino Marketing, 491 N.W.2d at 889. The state has a substantial interest in policing conduct in the marketplace. See Minn. Stat. § 8.31, subd. 1 (charging the attorney general's office with responsibility for regulating currency exchanges and telephone advertising services, and investigating and punishing unfair discrimination and competition, unlawful trade practices, violations of state antitrust laws, false and fraudulent advertising, and the monopolization of food products). Furthermore, for the same reasons that the state may seek to minimize invasions of residential privacy, the state may also act to protect the integrity of the workplace; an office is no more a public forum than a residence.

In summary, the defendants have offered two justifications for the Minnesota ADAD statute: the protection of privacy and public safety and the prevention of disruption to commerce in the state. The Court concludes that these rationales constitute significant governmental interests.

The Court turns next to consider whether the statute is

narrowly tailored to meet these interests. A time, place or manner regulation is "narrowly tailored" when it is not substantially broader than is necessary to achieve the government's interest. Ward, 491 U.S. at 799, 109 S. Ct. at 2758. The statute focuses on securing the subscriber's consent before a prerecorded message is delivered. The ADAD statute does not prohibit the use of ADADs, nor does it prohibit the use of prerecorded or synthetic voice messages. Rather it addresses the fact that subscribers lack a meaningful way to avoid such messages without first being subjected to them. The Court concludes that the statute imposes a narrow restriction on the use of a particular form of technology to disseminate speech in a nonpublic forum.

Finally, the Court addresses whether the ADAD statute leaves open ample alternative means of communication. Canvassing, handbilling, and using live persons — whether paid or volunteer — to place calls manually or by autodialers, are plainly not prohibited by the amended statute; all are available means of communication. Van Bergen does not dispute that these other forms of communication are available; rather, he contends that he cannot afford to use live operators or alternative automatic dialing technology which connects the caller to a live operator. The Constitution does not guarantee a person the most efficient means of communication; it is appropriate for the government to balance the efficiency with which speech is disseminated against the public's interest in privacy and public safety. See Casino

Marketing, 491 N.W.2d at 890.

Accordingly, the Minnesota ADAD statute does not violate the plaintiff's First Amendment rights as those are incorporated through the Fourteenth Amendment.

## B. Violation of the Equal Protection Clause

Van Bergen also contends that the ADAD statute violates the Equal Protection Clause of the Fourteenth Amendment. He argues that the three exclusions from the consent requirement in Minn.

Stat. § 325E.27 discriminate impermissibly against him. The three groups who need not obtain consent to deliver a prerecorded or synthetic voice message by an ADAD are (1) school districts, calling students, parents, or employees, (2) callers who have a current business or personal relationship with the subscriber, and (3) employers calling employees to advise them of work schedules. Id.

The Equal Protection Clause requires the government to treat "all similarly situated persons" alike. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439, 105 S. Ct. 3249, 3254 (1985). As the state supreme court has observed, the three groups excluded from the consent requirement all have a pre-existing relationship with the subscriber. Van Bergen is not similarly situated to these exempted groups: his purpose in using ADAD technology is to reach unknown persons with whom he has no business or personal relationship to encourage them to vote and

to introduce himself as a candidate. The Court concludes that the statute does not infringe upon plaintiff's right to equal protection under the law. 17

#### Conclusion

Upon all the files, records and proceedings herein -including the Court's foregoing analysis of the constitutionality
of the Minnesota ADAD statute, on its face and as applied, under
the First and Fourteenth Amendment, the Equal Protection Clause,
and the Supremacy Clause -- the Court concludes that plaintiff is
not entitled to declaratory or injunctive relief. Accordingly,
IT IS ORDERED that plaintiff's Verified Complaint is DISMISSED
WITH PREJUDICE.

Date: July /8 , 1994.

RICHARD H. KYLE

United States District Judge

Van Bergen contends that the "preexisting business or personal relationship" exception is broad enough to reach incumbent politicians such that incumbents could uses ADAD technology to deliver prerecorded messages whereas other candidates could not. The Court finds no basis for such a broad reading of the term "business or personal relationship" in either the statute or the state-supreme court's opinion in <u>Casino Marketing</u>.

<sup>17</sup> Even if the exceptions to section 325E.27 did violate the Equal Protection Clause, the Court notes that the Minnesota Legislature has provided that a statute is severable unless otherwise provided. Minn. Stat. § 645. 20. Although a federal court may not place a limiting construction on a state statute, the Court notes that a basis for a saving construction exists.

## UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA THIRD DIVISION

Richard T. Van Bergen,

Plaintiff,

Civil No. 3-94-731 ORDER

VS.

State of Minnesota, Hubert H. Humphrey III, in his capacity as Attorney General of the State of Minnesota,

Defendants.

Daryl J. Bergmann, Business Legal Services, Bloomington, Minnesota, for plaintiff.

James P. Jacobson and Peter Ackerberg, Minnesota Attorney General's Office, Saint Paul, Minnesota, for defendants.

Before the Court is defendants' Motion to Quash Trial Subpoenas of two state officials:

- (1) Attorney General Hubert H. Humphrey III; and
- (2) Curt Loewe, Manager of the Consumer Services Division of the Attorney General's Office.

Pursuant to Rule 45(c) of the Federal Rules of Civil Procedure, the Court may, on a timely motion, quash or modify the subpoena if it "subjects a person to an undue burden." F.R.Civ.P. 45(c)(3)(C)(iv).

At the hearing on defendants' motion, held July 12, 1994 at 9:30, defendants withdrew the affidavit of Chris Loewe and offered in its place the affidavits of two other members of the Attorney General's staff. The parties agree, and the Court finds, that the subpoena of Chris Loewe may be guashed as moot.

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JUDGMENT ENTD.

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With respect to the subpoena of Attorney General Humphrey, based upon the representations made by plaintiff's counsel on the record as to the scope of plaintiff's planned cross examination, the Court concludes that his testimony is not necessary to a determination of the facial constitutionality of the challenged state statute. See Ludlow Corp. v. DeSmedt, 249 F. Supp. 496, 502 (D.C.N.Y. 1966) (subpoena meets requirements for enforcement if information sought is reasonably relevant to ultimate inquiry), aff'd 366 F.2d 464 (196), cert. denied 385 U.S. 974, 87 s. Ct. 513 (1967); Moffett v. Arabian Am. Oil Co., 8 F.R.D. 566, 568 (D.C.N.Y. 1948) (witness will not be required to appear at trial unless testimony is reasonably necessary to claim); see also United States v. O'Brien, 391 U.S. 367, 383, 88 S. Ct. 1673, 1682 (1968) (allegedly illicit motive not grounds for striking down otherwise constitutional statute).

Accordingly, IT Is ORDERED that defendant's Motion to Quash Subpoenas is GRANTED.

Date: July / 1 , 1994

RICHARD H. KYLE

United States District Judge

# UNITED STATES DISTRICT COURT DISTRICT OF MINNESOTA

Richard T. Van Bergen

Case No. Civil 3-94-731

٧.

JUDGMENT IN A CIVIL CASE

The State of Minnesota, Hubert H. Humphrey III, in his capacity as Attorney General of the State of Minnesota

- ( ) Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- (X) Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that plaintiff's verified complaint is dismissed with prejudice.

DATE: July 18, 1994.

A true copy in \_\_\_\_\_\_ sheet(s)
of the record in my clastical, 1994
CERTIFIED \_\_\_\_\_\_ 1994
Francis E. Dosal, Clerk
BY: \_\_\_\_\_\_ (0.000)

FRANCIS E. DOSAL, CLERK

Patricia J. Sabin, Deputy Clerk